No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY,
a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

On Appeal from the United States District Court for the Northern District of California
Honorable Lloyd H. Burke, District Court Judge

APPELLANT'S REPLY BRIEF

ROBERT C. TAYLOR,
RONALD H. KLEIN,
233 Sansome Street,
San Francisco, California 94104,
Attorneys for Appellant
Jones Stevedoring Company.

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APPELLANT'S REPLY BRIEF

Appellee Nippo Kisen Company, Ltd., and appellee Stockton Bulk Terminal Company of California, Inc., have both filed briefs in opposition to appellant's opening brief in this matter. This reply brief will consider the two opposing briefs together.

1. THE GENERAL APPROACH

The opposing briefs are cast mainly in terms of the "clearly erroneous rule." That is, the shipowner frames the issues solely as to whether the finding that Mastro was an employee of Jones Stevedoring Company is supported by substantial evidence. That brief, as well as a large portion of the brief filed by Stockton Bulk, then purports to review items of evidence and non-evidence in an effort to support the decision below.

However, the primary question on appeal is not that of the findings. The question is one of law: "Who owed a warranty of workmanlike service to the shipowner?" This is treated in detail in appellant's opening brief, pages 9 to 24, and need not be repeated herein, except to note that when the relevant factors are considered, the conclusion must be that Stockton Bulk rather than Jones owed such a warranty.

Appellee Nippo Kisen, the shipowner, has not even attempted to deal with this question in its brief. This is understandable, since there was absolutely no proof at the trial on this issue favorable to the shipowner. The shipowner failed to establish its right to indemnity against Jones, since it failed to show any relationship between the shipowner and Jones which would give rise to the warranty of workmanlike service under the circumstances. On the other hand, the evidence does show that Stockton Bulk bore such a relationship to the shipowner. This is sufficient basis alone for reversing the judgment and ordering that the impleading petition be dismissed as against Jones.

Appellee Stockton Bulk has attempted to meet this issue by arguing that Jones rather than Stockton Bulk is in the position contemplated by the cases setting forth the basis for indemnity. While this approach at least concedes the validity of appellant's argument on the basis of indemnity, Stockton Bulk's attempt to distinguish the situation is inadequate.

Stockton Bulk's argument in this regard appears to run as follows. There was no defect in any gear of Stockton Bulk which contributed to the accident. Jones, not Stockton Bulk, was responsible for the "operative details." Therefore, Jones and not Stockton Bulk is in the position contemplated by *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748, 11 L.ed.2d 732 (1964). Jones, it is urged, is liable for human failure, and Stockton Bulk for gear defect. Stockton Bulk's brief, 15.

This is a fatal admission for Stockton Bulk. For if the liability is admitted in the one case, it must be because Stockton Bulk owed a warranty to the vessel that its work of loading ships would be done in a workmanlike manner. Thus, Stockton Bulk's concession is in effect an admission that it did owe a warranty to the ship. This, then, is the warranty breached by Mastro's negligence. The fact that human failure rather than defective equipment caused the accident would seem to be of no importance, since Stockton Bulk, not Jones, had supervision and control over the way in which the work was being done as well as the equipment being used. See appellant's opening brief, 17 to 21. Stockton Bulk's argument necessarily admits

that indemnity liability should follow right and exercise of control, which is the very argument urged by appellant. If this is so, a careful review of evidence admitted at the trial supports only the conclusion that Stockton Bulk had the right of control over the men as well as the machinery, and that it fully utilized this right. See the discussion of the evidence below, as well as in appellant's opening brief, 17 to 24.

Stockton Bulk's argument to the contrary is merely circular reasoning, based upon an assumption of the very question to be decided, and aided by a misreading of the evidence. This argument is totally unsupported by the record. Jones was not responsible for "the operative details of the work," either in contemplation of the arrangement between Stockton Bulk and Jones, or in actual practice. The record as cited in Stockton Bulk's review of the evidence at page 10 of its brief did not reach the issue as to which company had and exercised the right of supervision and control. Again, this material is set forth in appellant's opening brief at pages 17 through 24.

It is there shown that on-the-job supervision was carried out by Stockton Bulk's permanent employees, Leo Goodwin and Charles F. Cook, who gave any necessary orders, spotted the ships on arrival, and delegated authority to the walking bosses who were selected on a preferred basis by Stockton Bulk. Jones' activities were limited to paper work. *Ibid.*

Thus, whether human or machine failure was involved, it was Stockton Bulk who was in the position contemplated in *Italia Societa, supra.*

Furthermore, Stockton Bulk's argument overlooks the first of the two reasons for the basis of indemnity, namely the holding-out as an expert in cargo-loading. See appellant's opening brief, pages 10-14. Here, Stockton Bulk not Jones, was the expert in loading ships with bulk ore, in the circumstances of this case. *Id.* 17-19; 21-22.

Thus, the shipowner fails even to recognize the basic issue in this case, and Stockton Bulk, recognizing it, fails to extricate itself from the logical result of its concession.

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2. THE CLEARLY ERRONEOUS RULE

At pages 24 to 28 of its opening brief, appellant Jones Stevedoring Company argued that this court is not bound by the "clearly erroneous rule". In opposition, the shipowner merely states that there is no support for this assertion, and notes that the issue of employment would have gone to a jury in a jury case. Shipowner's brief, 5-6.

However, at the trial, the shipowner took the opposite approach, and in objecting to a question asked of appellant's witness, Rudolph J. Danska, regarding employment, contended that employment was a legal conclusion to be arrived at based upon the underlying facts.[1]

Appellee shipowner should not now be allowed to argue just the opposite of what it relied on to its

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[1] "By Mr. Klein: Q. Now, without labeling the men that came out of the hall and ignoring that for a moment, were any em-

benefit in the trial court. Having urged there that employment is a legal determination to be made from underlying facts, it should not be allowed to assert here on appeal that it is a simple factual determination which was resolved by the trial judge by a process of believing one set of witnesses as against another, based upon their credibility.

Employment is a legal conclusion, as originally stated by shipowner's counsel, and this is the reason that Jones urged the trial court to make extensive factual findings to support its legal determinations, and the reason that Jones on appeal urges that the clearly erroneous rule does not apply. See Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions, R. 132-137, and appellant's opening brief, 24-28.

In this connection, it is difficult to understand the importance ascribed to credibility at the trial. Shipowner's brief, 6, 10. Certainly, credibility was very much in issue in the main or personal injury portion of the trial, resulting in a judgment against Mastro. However, on the issues of indemnity, the factual mat-

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ployees of Jones Stevedoring Company ever on the ore dock in connection with these loading operations?

The Court: Wait a minute. Is there an objection to that, Mr. Partridge?

Mr. Partridge: I must confess that I was looking at my notes rather than——

The Court: Let's rely on Mr. Ford.

Mr. Ford: I would object to it on the ground of whether or not he is an employee calls for a legal conclusion, an ultimate fact to be found by this Court, and he can testify under what facts the men were there and who could fire them.

The Court: I will sustain it on that ground." (Tr. 220.)

ters were uncontradicted, and in some part the subject of stipulation. Only the conclusions were contested.

The alleged close questioning of Danska by the court suggested at page 6 of the shipowner's brief, had to do with whether Jones or Stockton Bulk actually called the union hall to obtain the longshoremen to work at the ore dock. (Tr. 216-219.) Whether or not this testimony was evasive as urged by the shipowner's brief at page 6 seems quite beside the point when is later admitted on the record by Stockton Bulk's superintendent, Cook, that he ordered the men from the union hall. (Cook deposition, placed in evidence at Tr. 235, and read into the record at Tr. 243.) Mastro testified that Stockton Bulk's manager, Goodwin, also called the hall. (Tr. 95-96.)

Similarly, the shipowner alleges at pages 6 and 10 of its brief that Danska was impeached. This again referred to who ordered the men from the hall, and in view of Cook's admission, seems totally without point. In any case, there was no impeachment, since the prior statement was not clearly inconsistent. Witkin, California Evidence § 1254 (2d ed. 1966). In his testimony at the trial, Danska stated that the longshoremen were dispatched from the longshore hall, and that Stockton Bulk "ordered these men." (Tr. 217.) The prior statement in the witness's deposition was that Jones probably ordered the men from the hall, but that he was not sure. (Tr. 229.) Again, on cross-examination at the trial, he explained that at the time of the deposition he was not sure, but had confirmed the information since then that Jones did

not order the men. (Tr. 232-233.) If "impeachment" this was, it appears quite innocuous in the context of the trial.

Stockton Bulk admits that there was general agreement in the testimony in this case, with some alleged significant contradictions between that of Danska and A. W. Gatov, President of Stockton Bulk. Stockton Bulk's brief, 20. These supposed contradictions form the basis for distinguishing this case from *Taft Broadcasting Co. v. Columbus-Dayton Local,* 297 F. 2d 149 (6th Cir. 1961). In that case, cited in appellant's opening brief at pages 25 to 27, the court held that the determination of employment was in reality a conclusion of law, and that the appellate court was free to draw its own legal conclusions and inferences. There, the trial was upon stipulated facts. Here, it is asserted, the contradictions mentioned above serve to distinguish that case. However, these contradictions are not pointed out in Stockton Bulk's brief. A perusal of Stockton Bulk's extensive review of the evidence in its brief at pages 8 to 13 reveals one distinction in the area of legal conclusions. It is indicated at page 9 that Danska testified that the arrangement between Jones and Stockton Bulk was a "payroll service," while Gatov testified that Jones was a "labor contractor." Stockton Bulk admits that this is only a dispute as to "the nomenclature describing the agreement." *Ibid.* Beyond that, no contradictory evidence is shown, and the record reveals none.

In addition, the facts were the subject of a number of stipulations set forth in the record. (Tr. 223-225.)

The remaining evidence is clearly uncontradicted, as set forth in appellant's opening brief, beginning at page 17.

Finally, the trial judge seemed firmly of the opinion that there was no conflict in the evidence, but that it was just a determination of law to be made. (Tr. 222-225, 235.) No doubt for this reason, he elicited the various stipulations indicated above, and on several occasions indicated that he would accept the facts as stated by Danska, in the absence of anything contrary, which did not in fact develop. (Tr. 222, 224.)

In these circumstances, it is difficult to see any need for the evaluation of credibility, and it is clear that the judge was not doing so. The distinction between this case and *Taft Broadcasting Co., supra,* therefore disappears, and the Court of Appeals can review the trial court's determination for what it is: a conclusion of law.

Stockton Bulk urges that "The appellate court is in no position to superimpose its determination of the facts upon the trial court that took the evidence in the case. It is often said that the question of employment is a mixed question of law and fact." Stockton Bulk's brief, 21. As indicated in appellant's opening brief, whether the determination of employment was a conclusion of law or a mixture, the appellate court is empowered to and should make its own determination in this regard. Appellant's opening brief, 27-28.

However, Stockton Bulk goes on, if further findings of fact are necessary, the case should be remanded for that purpose to the trial court. Stockton Bulk's

brief, 21. In view of the uncontradicted state of the evidence, it is clear what additional findings would be made upon remand. They would inevitably be those suggested by Jones to the trial court. Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions. (R. 132-137.) These findings of fact, or similar ones, can and should be adopted by the Court of Appeals. *Yanish v. Barber,* 232 F.2d 939 (9th Cir. 1956).

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3. THE EVIDENCE

If the record is reviewed, it will be seen that there is no substantial evidence to support the conclusion or finding that Mastro was Jones' employee for purposes of indemnity. The evidence has previously been analysed in appellant's opening brief, and the present brief will deal only with the matters raised in the briefs of appellees.

In attempting to support the determination made below, the shipowner resorts to a review of matters that were not in evidence at the trial, presumably because there is a lack of substantiating evidence with which to deal. For example, most of pages 7 and 8 of its brief concern colloquy of court and counsel, which is obviously not evidence. The subject was insurance, and all testimony on this subject was stricken by the court on appellant's motion. (Tr. 248-249.) At pages 10 and 11, reference is again made to workmen's compensation, of which there is no evidence in the record. Similarly, Stockton Bulk utilizes such items

of non-evidence to buttress its argument. Stockton Bulk's brief, 12, 14, 19-20. In any event, the trial judge did not consider that workmen's compensation benefits constituted a deciding factor, and stated that he would not regard it as such. (Tr. 231.) In this, he was correct. *Deorosan v. Haslett Warehouse Co.,* 165 Cal.App.2d 599, 611-612, 332 P.2d 442 (1958).

Removing this material from consideration, there is left very little of the shipowner's brief. There is Mastro's conclusion that Jones was his employer, but that is tempered by the additional testimony that he so testified since Jones was handling the payroll. Further, he testified that Cook or Goodwin, Stockton Bulk's permanent employees, called the union hall for the longshoremen and gave any orders with regard to the work done at the ore dock, which is where he went to work. (Tr. 95-98.) Thus, there is evidence contradicting the conclusion within Mastro's own testimony.

The accident report, defendant's exhibit "D" is in evidence, showing Jones Stevedoring Company as Mastro's employer. However, this was pursuant to the oral arrangement between Jones and Stockton Bulk, and it should be noted that Goodwin made out the accident report and signed it. (Tr. 240.) Thus, when viewed in context, this fact is of no significance.

This leaves the testimony in the deposition of A. W. Gatov, President of Stockton Bulk, quoted at length in the shipowner's brief at pages 8 to 10. This testimony consists largely of self-serving legal conclusions regarding the operation of the business in connection

with the oral arrangement with Jones. The significant portion of the testimony is as follows: "Well, the only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral material to stockpile them and to subsequently load that material to ships." (Gatov deposition, page 6, lines 22-24.) That is, Stockton Bulk stevedored the vessel. This testimony is in accordance with the arrangement between Jones and Bulk whereby Jones would take care of payroll matters for Stockton Bulk's ship-loading work. The conclusion that "The only employees that the Stockton Bulk Terminal Company ever had were the administrative managerial employees," (Gatov deposition, page 6, lines 5-6) is refuted in the portion of Gatov's own testimony quoted by shipowner in its brief at page 9, when he admitted that there were "a couple of superintendents" in the employ of Stockton Bulk. (Gatov deposition, page 6, line 12.) These men were obviously operations people, not administrative people, as can be seen from their duties, shown below. This is also hinted at when Gatov evaded the direct question "Who furnished the supervision of these men?" by stating that "The immediate supervision was provided by a walking boss. . . ." (Gatov deposition, page 7, lines 7-8.) A review of the entire deposition, including portions not quoted by the shipowner, further underscores this aspect of the testimony, and places the quoted portion in its context. For example, shipowner's counsel asked Gatov: "On January 9th, 1962 did Stockton Bulk Terminal have any employees other than the executive officers of the corporation?" The answer was "No." (Gatov deposition, page 5,

lines 22-24.) Mr. Gatov, of course, had to retreat from this position upon close questioning. For example, he admitted that Cook and Goodwin, the superintendents, had three assistants to keep track of the material loaded aboard ships. These people were concerned with the total operation of the company, in getting the material from the railroad gondola cars, to the stockpile, to the ship. (Gatov deposition, page 8, lines 9-23.) He admitted that Cook and Goodwin gave orders to the walking boss "with respect to where the cargo was going and how much was going in there and whether it would go center line drop or to the wings, the stowage having been worked out between our supervisor and the vessel's officers." (Gatov deposition, page 9, lines 1-6.) It is abundantly apparent that this company did not operate with a mere executive skeleton, but was closely involved in the business of loading ships with bulk ore, which, of course, was its business. There was an unusual arrangement for the handling of its payroll matters, but this did not in any way remove Stockton Bulk from the conduct of its own business. Thus, Gatov's deposition testimony merely confirmed other evidence in the case with regard to the arrangement between Jones and Bulk, and how that arrangement was carried out in practice on Stockton Bulk's ore dock.

The shipowner concludes the liability portion of its brief with a reference to *LaBolle v. Nitto Line,* 268 F.Supp. 16 (N.D.Cal. 1967). It is clear even from the facts stated in shipowner's brief that this case is not in point. No issue was raised in that case as to the existence of a warranty owed to the ship, nor were

there any issues as to who employed the injured longshoreman. It was merely urged that the longshoreman was not acting within the scope of the admitted employment, but was on a frolic of his own when he entered an unlit hatch. Among the items of evidence which were held to negate this defense was the fact that the company paid compensation, liability for which arises only when the injury is in the course and scope of employment. In the present case, there is no such issue raised, and the questions presented are entirely different. This is particularly so in view of the fact that the motion to strike testimony as to compensation was granted below. (Tr. 248-249.)

The items of non-evidence should also be removed from consideration of Stockton Bulk's brief. The facts recited in the statement of the case, summary of facts, and argument are replete with misleading statements as to what was admitted into evidence, and as to what the evidence actually was. For example, there is no evidence as to any collective bargaining agreement between P.M.A. and the International Longshoremen's and Warehousemen's Union. Stockton Bulk's brief, 8, 13-14, 16. Thus, when Stockton Bulk argues at page 9 that it "could not 'employ' longshoremen, gang bosses or walking bosses from the Union Hall," it is misleading and incorrect, and it ignores all of the evidence in the case as to the arrangement between Jones and Bulk. It is misleading in stating facts not in evidence when Stockton Bulk, at page 13-14 of its brief, purports to "summarize the facts" by stating: "All right of employment, including the right to hire and fire arose through the

Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Jones was a party to the contract. Stockton Bulk was not. Only Jones had the right to hire and fire." This is also true of the statement at page 16 of that brief: "Mastro was a member of the I.L.W.U. and the enforcement procedures which would require that Mastro follow the safety rules and practices contemplated by the agreement would be available only to Jones." There is absolutely no evidence in the record to support these statements by Stockton Bulk.

Actually, the only evidence as to the right to hire and fire was to the effect that Stockton Bulk itself could choose the walking bosses it wanted to do its work (Tr. 226-227), and that Stockton Bulk would call the union halls and order the necessary men. (Tr. 95-96; 217; 242-243.) No other evidence with regard to the right to hire and fire appears in the record.

Similarly, Stockton Bulk's brief is misleading as to the control of the work done in loading ships with bulk ore. Stockton Bulk would have the court believe that Stockton Bulk's supervision consisted of showing the men where the ship was, and telling them what material was to be loaded, leaving everything else to the longshoremen. At page 10 of its brief, Stockton Bulk purports to quote testimony of its superintendent, Leo Goodwin, as to what orders he would give to the walking bosses. It appears that the orders would be for "starting the ship. That's all." A review of the record will show that this statement is misleading in the extreme. At that point of the trial, counsel for

Stockton Bulk was reading from the deposition of Charles F. Cook, one of the superintendents for Stockton Bulk. What Mr. Cook actually said was as follows:

> "Q. Now will you tell me what the procedure is once the men arrive, what time approximately would they arrive, who would arrive first.
>
> A. The walking boss would arrive first. He is paid one hour prior to starting time.
>
> Q. And then you would—
>
> A. I would give him the orders for the shift starting the ship.
>
> Q. You say the walking boss would come out an hour earlier?
>
> A. Yes." (Cook deposition, page 39, lines 7-16; partially read into the record at Tr. 245-246.)

The words "that's all," were those of Stockton Bulk's counsel at the trial indicating that he was finished reading from the deposition. It certainly was not "all" as to the direction and control given by Cook or Goodwin for Stockton Bulk. Cook went on in his deposition to show the extent of his and Goodwin's authority. Cook would discuss the entire operation with the walking bosses at the start of each shift, and most necessary orders would be given then. If there was some change in plans, obviously new orders would have to be issued later. (Cook deposition, page 40, line 4 to 7.)

In addition, Goodwin was in charge of the ore dock, and if any orders were to be given, he gave them. If he was not on duty, then Mr. Cook gave the orders. Thus, "all orders in regard to stowage of these vessels

came from Mr. Cook or Mr. Goodwin. . . ." (Tr. 96, 123.) Cook or Goodwin would confer with the mate with regard to decisions to be made as to stowage. (Tr. 97.)

Stockton Bulk's statement at page 10 of its brief states that "The walking boss, gang boss and longshoremen were responsible for the operative details of the work, including rigging the gear . . . and spotting the ship," is not supported by the references to the record, nor by the other evidence. Stockton Bulk refers to the record at page 122, but it is seen that the testimony there was that orders with regard to spotting or shifting the ship would be given to the walking boss by Cook or Goodwin. (Tr. 122.) When such a decision was made by the walking boss, it is clear that he was exercising authority delegated to him by the superintendents. (Tr. 244.)

Stockton Bulk's assertion at page 11 of its brief, regarding the preparation and handling of the payroll, is somewhat misleading, in that it omits the fact that after the payrolls were made up by the walking boss or gang boss, they were turned into the office of Stockton Bulk. (Tr. 227, 233-234.) Thereafter, Stockton Bulk forwarded the payroll materials to Jones for processing under the oral arrangement between them. (Tr. 227, 233-234.)

At page 11 in its brief, Stockton Bulk characterizes the payments made by Stockton Bulk to Jones under the arrangement as "the entire amount of the payroll, plus all assessments, plus a profit." Reference is made to the deposition of Gatov, at page 12. Actually,

the "profit" to Jones was, in Gatov's words, "in the form of a service charge per check." (Gatov deposition, page 13, line 1.) There was no compensation measured by tonnage or hours worked. This clearly shows what Jones was being compensated for: Its clerical and payroll services performed pursuant to the oral contract with Bulk; not for stevedoring. (Gatov deposition, page 12, lines 18-20.)

Finally, with regard to the accident report, it is misleading for Stockton Bulk to state in its brief at page 13 that accident reports were ordinarily made out by the walking boss, since the testimony was that the accident report for the present injury was made out by Goodwin. Normally, he considered it his duty to see to it that such a report was made out in case of any accident. (Tr. 240.)

Stockton Bulk's argument that Jones was in a better position to prevent Mastro's "human failure" than Bulk, founders on the record, which shows that Stockton Bulk had the right to supervise and direct the operation, and exercised that right. Jones did not have that right under the arrangement with Stockton Bulk, and in no way supervised or controlled the operation. Appellant's opening brief, 20-21. Jones had no opportunity to prevent work being done by an improper method, but Stockton Bulk was in just such a position, since it was in control of the operation. Accordingly, under *Italia Societa, supra,* liability should fall upon Stockton Bulk.

Stockton Bulk argues that under *Arista Cia. DeVapores v. Howard Terminal,* 372 F.2d 152 (9th Cir.

1967), whoever "provides" longshoremen who are negligent, should be liable to the ship. Jones may have "provided" the longshoremen to Stockton Bulk under its oral arrangement, but it is clear that Stockton Bulk "provided" the longshoremen to the ship. The portion of the decision quoted at page 17 of Stockton Bulk's brief indicates that the duty to provide safely-working longshoremen arises from the warranty of workmanlike service owed to the vessel. The only warranty in the case is that of Stockton Bulk. Mastro's negligence must therefore be Stockton Bulk's breach.

At pages 18 through 20 of its brief, Stockton Bulk agrees with appellant's argument that the determination of employment must take into consideration the factors of direction and control. Further, Stockton Bulk urges, the right to hire and fire is a factor, as is the obligation to pay wages. However, as indicated above, there is no evidence that Jones had the right to select and retain Mastro and that Stockton Bulk did not have this right. As to payment of wages, the actual payment to the men was made by P.M.A. (Tr. 234.) In arguing at page 19 that "Jones had the obligation to and did, in fact, pay Mastro for his services," Stockton Bulk must of necessity be arguing that Jones paid Mastro because Jones reimbursed P.M.A. However, this concept carried to its next logical step requires the conclusion that Stockton Bulk in fact paid Mastro, for Stockton Bulk reimbursed Jones for the money thus expended. (Tr. 215, 224, 234; Gatov deposition, 11-13.)

This leaves the factor of direction and control, which is dealt with at length in appellant's opening brief, pages 18-24. The obvious conclusion is that Stockton Bulk was the employer.

At page 19 of its brief, Stockton Bulk raises the question of general and special employment, citing some California authorities. In this analysis, Jones would be the general employer, and Stockton Bulk would be the special employer.

The pertinent authority in this area is *Deorosan v. Haslett Warehouse Co., supra,* 165 Cal.App.2d 599, 332 P.2d 442, (1958). That case confirmed the general rule that where an employee is provided by his general employer to a special employer, the special employer and not the general employer is master *pro hac vice* and liable for injuries caused by the acts of the employee, while engaged in the performance of duties pertaining to the special service, if in the special service he is subject wholly to the direction or control of the special employer.

Here, the evidence, as indicated above, shows that Stockton Bulk and not Jones had total control over the work done. The only evidence as to the right to hire and fire indicates that Stockton Bulk and not Jones held that right to the extent that it existed.

In passing, the court in *Deorosan, supra,* distinguishes the cases cited by Stockton Bulk on their facts. In those cases, the general employer leased equipment and also furnished the employee to operate it. The general employer was held to have retained a vital interest in the proper operation of the equip-

ment, and was not allowed to escape liability. However, in *Deorosan* as well as in the instant case, no such equipment was involved. In fact, in the present case, the equipment utilized was that of Stockton Bulk, the special employer.

It should be noted that in *Deorosan,* the general employer alone had the right to fire the employee, and retained him on its payroll, although the wages were reimbursed by the special employer. The important fact was that the employee was under the direction and control of the special employer, as in this case.

Further, the court in *Deorosan* held that the fact that the general employer, who was exonerated from liability, provided workmen's compensation coverage, was immaterial with regard to the liability of the general employer for the acts of the employee.

Finally, Stockton Bulk has characterized Jones' role in this matter as that of a labor contractor or labor agent. (Gatov deposition, page 10, lines 17 to 18; Stockton Bulk's brief, 9.) In California, a labor contractor is treated as an employment agency. See California Labor Code, section 1551 (c), repealed in 1967 and replaced by California Business and Professions Code, section 9902 (c).

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4. CONCLUSION

This is a unique case in a unique field of law. There is accordingly no easy answer to the issues raised herein, nor any one authority to which reference can be made. The principles to be applied must be culled

from various cases which have dealt with the relationships involved herein. The decisions examining the nature of the shipowner's right to indemnity provide the primary illumination to the problem. The warranty of workmanlike service is seen arising out of the relationship because of the expertise of the company loading the vessels, and its direction and control which give it the best ability to prevent accidents. In the circumstances of this case, that means that Stockton Bulk and not Jones owed such a warranty. Secondarily, this same direction and control result in the determination that Stockton Bulk was for all practical purposes Mastro's employer.

Although the shipowner has evaded the issue, Stockton Bulk has conceded that the basic analysis is correct. It is then faced with the task of justifying the decision in these terms, based upon a record that does not support it.

The result must be a reversal of the judgment below, and dismissal of the action as against Jones.

Dated, San Francisco, California,
March 5, 1969.

Respectfully submitted,
ROBERT C. TAYLOR,
RONALD H. KLEIN,
By RONALD H. KLEIN,
Attorneys for Appellant
Jones Stevedoring Company.